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PROBLEMS OF ROMAN LEGAL HISTORY.[1]

To attempt to recapitulate within the limits of a single paper the unsolved problems of Roman legal history would be an absurdity. Such an undertaking would make it necessary for us to follow the development of the Roman law from the Twelve Tables to Justinian's law books in order to indicate what portions of this millenial movement are still obscure. Even then the survey would be incomplete, since the history of the Roman law neither begins with the Twelve Tables nor ends with Justinian. It begins at that unknown date when Rome began and it has not ended yet.

To select a narrower period and to single out what seem the more important problems would be more feasible; but the mere enumeration of difficulties would be neither interesting nor profitable.

The best excuse for a paper on the problems of any science is the writer's conviction or hope that he may be able to make some contribution towards their solution, if it be only by suggesting unworked lines of investigation which appear to him to promise useful results. It is my belief that for the most important period of Roman legal history—the period in which the ancient Roman law, public and private, reached its highest development, and which extends, roughly speaking, from the middle of the third century before Christ to the middle of the third century after Christ—there is a promising method of investigation or line of approach which as yet has been scantily utilized.

[1]Read before the Congress of Arts and Sciences, St. Louis, September 21, 1904.

The method which I advocate is that of comparison; and the comparison which I suggest is with Anglo-American legal development from the twelfth century to the present day.

The older lines of investigation appear to be worked out. It does not seem likely that new material of importance will be discovered; we can hardly hope for a second find like the fourth book of the Institutes of Gaius; and all direct methods of interpreting the existing sources have been so diligently and ably exploited by European jurists, from Cujacius to Mommsen and Lenel, that every student of the Roman law now has the instinctive feeling that a new interpretation is probably a very doubtful interpretation.

The usefulness and the limitations of the comparative method of studying legal history perhaps need more accurate definition than they have yet received. The assumption with which comparative jurisprudence starts, is the essential identity of human nature everywhere. The inference is that social developments among the most different peoples would be identical if all had reached the same stage of development and were living under identical conditions. In this last qualification we have the first and most important limitation upon the comparative method. Conditions are never identical; they are at most broadly similar. The working hypothesis, accordingly, on which comparative jurisprudence proceeds, is that peoples in corresponding stages of social development are likely to approach legal problems from similar points of view and to attempt their solution on similar lines. The inference is that a fully known development in one nation may help us to interpret a partly known development in another nation. Proceeding with proper caution, we may even fill gaps in the historic record of one system by searching for the intermediate links in a similar chain of development in another system. Such reconstructions, it is needless to say, will seldom be indisputable, but they will be more nearly correct than the products of the historical imagination.

Another limitation upon the comparative method, as an agency in historic reconstruction, is found in the fact that different legal systems do not develop in absolute isolation.

The history of human law, as of all civilization, is largely a history of borrowings. I think, however, that this limitation is fully appreciated by students, and that there is at the present time little danger that it will be disregarded. The tendency of historical jurisprudence now, as in the past, is rather to exaggerate than to overlook the borrowed elements in each legal development. Because the Romans had certain institutions which were not primitive and which resembled Greek institutions, and because similar institutions existed at a still earlier date in Egypt and in Babylon, there has been over-readiness amongst students to assume, without sufficient evidence, a series of imitations and an unbroken chain of derivations. A similar process of reasoning has attributed to Roman sources not a few English institutions which on closer investigation appear to be independent products, as truly English as they were truly Roman or, to put it more accurately, neither English nor Roman but human. Their similarity is due to the similar working of the legal mind under analogous conditions.

It may however, be granted that the comparative method must be used with caution, that the movements compared must be intrinsically comparable, and that allowance must be made for possible borrowings.

Given these limitations, it is not surprising that comparative study of legal institutions for purely scientific purposes has thus far been confined practically to the field of early law. There has been greater safety here, because the conditions of social existence are more uniform among barbarous peoples than among civilized nations, and because there is less chance of imitation of foreign customs.

In this part of the field, the application of the comparative method to the problems of Roman legal history has already yielded valuable results. The comparative study of early law in general has thrown light into many corners which were hopelessly dark to the later Romans themselves. "Not for all things established by our ancestors," wrote Julian, "can a reason be assigned"; but for quite a number of these things we are now able to assign reasons that are not merely plausible but convincing.

To the latter and more important stages of Roman legal development—to the public law of the later Republic, and

to the civil and prætorian law of the later Republic and of the early Empire—the comparative method has not been applied, or it has been applied sporadically only and with little result. The reason is very simple. The jurists of continental Europe have rightly felt that the other and more modern legal systems with which they are acquainted are not available for comparison. As regards public law, they have been living under absolute monarchies or under constitutional monarchies in which the monarch is still a real force. They have had no personal and vital acquaintance with republican government conducted on a large scale and maintained for a long period—no such experience as Englishmen have had, in substance, for two centuries and Americans, in form and in substance both, for more than a century. As far as popular participation in national government has been introduced in the larger European states, it has been borrowed from England and adapted to continental conditions. As regards private law, the continental European jurists have had personal and vital acquaintance with only two systems—the remnants of the old Germanic law, a law arrested in its development in the tenth century, and the law of the later Roman Empire, which at the close of the middle ages they borrowed *en bloc* and which they have since been modifying and assimilating. The only Germanic system which has had an unimpeded and continuous development, the only modern system which has an independent history comparable in its duration with that of the Roman law, is to them almost a closed book. On the other hand, the English, who have the data for comparison, have done little serious work in the field of Roman legal history, and the best of that work has been done in the field of Roman public law. In the field of private law they have relied on French and German writers, not only for the historic facts but for the interpretation of the facts.

But, it will be asked, are the modern Anglo-American and the ancient Roman legal systems fairly comparable quantities? Are there such broad analogies in their general development as to warrant the hope that a minute study of the one will be serviceable in interpreting the other? I grant the difficulties; they are sufficiently obvi-

ous; but I insist on fundamental although less obvious analogies.

The constitution of the Roman Republic was substantially an unwritten law, as is the English constitution. It consisted of precedents, *i. e.*, adjustments reached in the political field at the close of political conflicts. Of those adjustments a part, but only a part, was incorporated in declaratory statutes. In establishing their Republic, the Romans retained their ancient elective kingship for ceremonial purposes, housing the King of the Sacra in the old royal palace and treating him as head, or rather as figure-head of their state church. The real powers of the kingship they entrusted to officials elected by political parties. The English have retained a less shadowy kingship, but they have similarly transferred the most important powers of the crown to a small body of officials who represent the dominant party in an elective assembly. The Romans put their ex-magistrates into a Senate, the English keep their ex-ministers in their Privy Council.

The American constitution, on the other hand, is indeed a written one, but there has grown up beside it a body of authoritative precedents. The American executive has many points of resemblance, in time of peace, to a Roman consul; in time of war, to a Roman dictator. To the Romans, the chief change which occurred when the Republic was established was that the royal power was entrusted to magistrates elected for short terms. Sir Henry Maine asserts that in their presidency the Americans have perpetuated the monarchy of George the Third. A witty Frenchman, M. Raoul Frary, tells us that England is now a republic with a hereditary president, while the United States is a monarchy with an elective king. The common element—and the fundamental element—in all three constitutions is the exercise of governmental power by men elected by party organizations.

Great Britain, like Rome, has built up a world empire; and like Rome it has combined domestic liberty with external power by limiting governmental authority at home and permitting it to act freely abroad. The reserve powers of the British crown furnish the constitutional historian with an exact analogy to the war power (*imperium*

militiæ) of the Roman consul. The viceroy or governor is the English equivalent of the Roman proconsul or proprætor; and colonial affairs are controlled by the British Privy Council as provincial affairs were controlled by the Roman Senate. As a matter of policy, Great Britain has conceded, as did Rome in the Republican and early Imperial periods, a large measure of local self-government to its subjects beyond the seas. In both empires we find the war power and the control of diplomatic relations in the hands of the home government, the ordinary administration decentralized and left in the hands of local authorities.

The United States, after rounding out its continental domain, has recently acquired possessions beyond the seas. In dealing with them it is somewhat embarrassed by the absence from its written constitution of indefinite and general governmental power—power corresponding to the Roman military imperium or to the residuary authority of the British crown. This difficulty was felt a century ago; when the process of continental expansion was beginning; and each successive exigency has been met, and is being met, by the development in our unwritten constitution of the war powers of the American President. In the administration of its earlier continental acquisitions, the United States, following the example of Rome and of Great Britain, encouraged the development of local self-government; and it is following the same policy in its new insular dependencies.

In the expansion of Great Britain and of the United States, as in the expansion of Rome, the fact of central interest is the up building of empire by a free people; and in the English and American Empires—if the insular dependencies of the United States are to be dignified with so high-sounding a title as empire—the fundamental problem is the same which confronted the statesmen of republican Rome, *viz.*, the reconciliation of empire with liberty.

One of the devices of Roman public law for limiting governmental power at home was an elaborate system of checks and balances. The power of almost every official was limited in its practical exercise by the independent and possibly opposing powers of other officials. In the hierarchy of superior and inferior officials which constitutes the

administrative system of the modern Continental European state, no such checks as these exist; but they are familiar to the English public lawyer, and they have been greatly multiplied in American constitutional law.

The Anglo-American law protects private rights against governmental encroachments not in modern European but in Roman fashion. In the place of administrative control of the inferior by the superior, which is so highly developed in modern European law, the English and American law, like the Roman, has developed control through the ordinary courts. When, for example, a Roman ædile destroyed merchandise which obstructed the public highway, the legitimacy of his action was tested, at Rome, not by appeal to the consul, but by an action to recover damages for illegal destruction of property, just as a similar exercise of police power would be tested in Great Britain or in the United States.

It may finally be noted that contemporary political conditions in the United States help us rightly to understand the dramatic final century of the Roman Republic. When we cease to view that period through the eyes of European scholars, we shall recognize that its salient characteristic was the appearance on a magnificent scale of those political personages whom we call "bosses"; and we shall discover that the Latin word for boss was *princeps*. *Princeps*, Mommsen tells us, was a word commonly used in the later Republic to designate the most prominent citizens. The definition might be made more exact. The citizens who were designated as *principes*—men like Marius and Sulla and Pompey and Crassus and Julius Cæsar—were prominent before all things in political management. They were the men who controlled the machinery of the senatorial and popular parties. The members of the first triumvirate, a body which an American politician would instinctively designate as "The Big Three," were described by Cicero as *principes*. In our federal system of government we have not developed any boss whose authority reaches beyond the limits of a single state; we have no national bosses; and if we had them, our constitutional and administrative arrangements are such that even a national boss could not readily put himself at the head of a large mercenary army

in New Mexico or in Alaska and upset the government by marching on Washington. These variations, however, do not affect the substantial identity in political science of our boss and the Roman *princeps;* and this identification enables us to understand that the official theory of Augustus and of his immediate successors—the theory that the free commonwealth was still in existence—did not seem to the Roman public to be a fiction. Through his control of the army the boss had become a military dictator; but the forms of popular government were, for a time, sufficiently preserved to enable intelligent citizens to blink the change, and to leave the majority of the citizens unconscious that any serious change had occurred. To them, Augustus was simply the boss raised to his highest terms. Consuls and prætors and all the other officers of republican government were elected on his nomination and the Senate was filled with his henchmen, but these were familiar accompaniments of boss rule. From this point of view, we can fully understand Pliny's remark, that the very men who were most averse to recognizing anything like lordship (*dominatio*) had no objection to the authority of a *princeps.*

Modern examples of the transformation of the party boss into the military monarch, with more or less careful maintenance of the forms of popular government, are not far to seek, but we must seek them still in the Latin world. English history offers no nearer parallel than the career of Cromwell; but Cromwell, although a party leader, was not a boss, and in the English Commonwealth the evolution of military monarchy remained incomplete.

In the field of private law the movement in the early Empire was substantially as well as formally a continuation of that in the late Republic; and during both periods the processes by which the Roman law, civil and prætorian, was developed, were fundamentally the same as those by which Anglo-American law and equity have been developed. This fundamental similarity is not generally appreciated, because the mode in which the Roman law was developed is not commonly understood. We read in every legal history that the Roman civil law was cast into the form of a code, the famous Twelve Tables, about four and a half centuries B. C., and that the further development of

this law was accomplished chiefly by interpretation of the Twelve Tables. We read also that the interpretation which was accepted as authoritative, and by which the law was developed, did not proceed from judges, but until the third century B. C. from a college of priests, and after that time from a small number of private citizens who were known as *jurisprudentes*. The English common law, on the other hand, as we all know, has been built up by judicial decisions; it is simply the permanent practice of the tribunals. At first glance it does not seem as if these two processes were analogous. On closer inspection, however, the differences are seen to be superficial. The law of the Twelve Tables was not a code in the modern sense of the word; it was simply a collection of the principal rules of early Roman customary law. From the point of view of comparative jurisprudence, it belongs to the same class as the early German Leges and the Anglo-Saxon dooms. It has recently been asserted by a prominent Italian historian that the Twelve Tables were probably a private compilation, and that the story of their construction by the decemvirs and of their submission to and acceptance by the Roman popular assembly deserves no more credit than the legend of the slaying of Virginia which forms a part of the narrative of the decemviral epoch. Still more recently this thesis has been defended with great ingenuity by a distinguished French legal historian. I myself have not been convinced by their arguments. I still cling to the belief that the essential part of the Roman story is probably correct; that the Twelve Tables were probably accepted by a Roman assembly as the German Leges were accepted a thousand years later by German tribal assemblies. For my present purpose, however, the answer to this historical question is not material. In the later Republic the compilation known as the Twelve Tables was officially regarded as a *lex;* it was revered as a charter of popular rights and as "the cradle of the civil law"; but it was interpreted with as much freedom as if it had been merely a private statement of the rules governing the administration of justice in a far away and semi-barbarous age. It really exercised little more influence on the administration of justice during the last century of the Roman Republic

than the laws of Alfred exercised upon the English administration of justice in the time of the Tudors. The compilation had been surrounded for generations by a growing mass of interpretation, which had so modified and supplemented its primitive and scanty provisions that for all practical purposes the interpretation and not the *lex* was the law.

The first alleged distinction between the development of Roman civil and English common law thus disappears. Each represents a development from rude and simple custom to refined and complex jurisprudence by means of interpretation. There remains, however, the apparent difference between the interpreters. What is there in common between the jurists of Republican Rome and the King's judges in England? To answer this question we must consider the position and activity of the Roman jurists. They obviously were not judges in the ordinary sense, for they did not hear pleadings or try cases. They rather resembled our lawyers, for they gave advice to all who chose to consult them. They helped their clients to avoid trouble by drafting contracts, wills and other instruments; and when trouble had arisen, they gave opinions (*responsa*) on the legal points at issue. So far at least their activities were those of practicing lawyers. But they differed from all other practicing lawyers of whom we know anything in two important respects. In the first place, they did not take charge of cases in litigation, either as attorneys or as barristers. They were willing neither to prepare cases for trial nor to argue cases before the *iudices*. Such matters were attended to by professional orators like Cicero. Cicero was a lawyer in our sense, but at Rome he was never regarded as a jurist. In the second place, while the Roman jurists were always ready to furnish opinions, they neither expected nor accepted pecuniary rewards. The rewards at which they aimed were the gratitude of those whom they had served, the confidence of the public, and eventual election to political office. As practicing lawyers they were, accordingly, servants of the public in general rather than servants of their special clients.

To appreciate how far the Roman jurists discharged the same function as the English judges, we must note how

controversies were actually decided at Rome and how they are actually decided under the English system. Controversies were actually decided at Rome, not by the magistrate who heard the pleadings, but by *iudices*, who were private citizens. Similarly, controversies have been decided for the last seven centuries in the Anglo-American administration of justice by juries, also composed of private citizens. Neither were the Roman *iudices* nor are the English jurymen supposed to know the law. As English jurymen are instructed by the judges, so the Roman *iudices* were instructed by the jurists. The instruction might be directly addressed to a *iudex* if he choose to ask for it, but it usually came in the form of an opinion obtained by one of the parties. It was of course possible that both parties might have obtained opinions from different jurists, and it was conceivable that the opinions might be conflicting. This, however, was not the rule but the exception; because the Republican jurists, in giving their opinions, were not in the position of paid advocates trying to make out a case for their clients; they were unpaid servants of the public and ministers of the law itself. Differences of opinion, under these circumstances, were no more numerous than those which have always existed in the English and American courts. The Republican *iudices* were not bound to follow the opinion of any jurist; they had the powers of English criminal jurors; they were judges of law and of fact alike. In both systems, however, it is noteworthy that the decisions actually rendered by *iudices* or by jurymen have never been cited as authority. What was cited at Rome was the response of a jurist, and what is cited in Anglo-American law is the opinion of the court. Hobbes perceived the fundamental analogy between the Roman jurists and the English judges when he declared, in his *Leviathan*, that the King's judges were not properly judges but jurisconsults.

The Roman law was thus developed, as the English law has been developed, not by the decision of controversies, as is sometimes said, but by the opinions expressed in connection with such decisions by specially trained and expert ministers of the law. The English judge combines some of the powers of a Roman prætor with the authority of a

Roman jurist—he is half prætor and half *jurisprudens;* but his influence upon the development of the law has not been prætorian but jurisprudential.

It should be noted further that single *responsa* did not make law at Rome any more than instructions from judges to juries have ever made law in England or in America. What were regarded at Rome as authoritative precedents were the so-called "received opinions," that is, the opinions which were approved and followed by the juristic class. In England and America, similarly, it is not the preliminary rulings or the final instructions of the trial judges but the opinions of the bench to which cases are carried on appeal that constitute precedents; and it is doubtful whether a decision of even the highest court in a case of first impression really makes law. It seems the better opinion that it is the acceptance of such a decision by professional opinion generally and its reaffirmation by the court in later cases which makes it really authoritative.

The real difference between the Roman jurists and the English judges was that the Roman jurists, like the law-speakers of our German ancestors, were designated by natural selection. It is interesting to note that, before the conversion of the Germans to Christianity, their law-speakers were priests, as were the earliest Roman jurists. After the Germans were Christianized, the law-speakers were those persons who were generally recognized as "wise men"; their position and their authority, like that of the Roman jurists of the later Republic, rested on general opinion, which was itself based on professional opinion. In the Frankish period the law-speakers began to be artificially selected. The Frankish count appointed the "advisers" (*rachineburgi*); and these advisers developed into the *Schöffen* of the middle ages. In other words, the German law-speaker is the ancestor of the European judge. At Rome also, in the Imperial period, artificial selection was substituted for natural selection. Certain jurists received from the Emperor "the right of responding"; and the *iudices* were thenceforth bound to follow opinions given by these certified or "patented" jurists unless divergent opinions were presented. This change brought the Roman jurists a step nearer to the Anglo-American judges. The

evolution was completed, as I shall presently indicate, in the second century after Christ; but before describing the processes by which law was made in the Empire, we must consider and compare Roman prætorian law and English equity, in order to see how far the processes by which these systems were developed present real analogies.

Roman prætorian law and English equity are in so far analogous as they both represent what the Romans called *ius honorarium*—"official law." In both cases the new law was produced by governmental agencies which were not exclusively nor indeed primarily judicial—agencies which set themselves above the previously existing law and not merely supplemented it but overrode it.

There was a superficial difference between the way in which the Roman prætors made law and the way in which the English chancellors made it. The prætors used the quasi-legislative form of ordinance or "edict"; the English chancellors developed new rules in judicial fashion by decisions rendered in single cases. When, however, we examine the edicts of the Roman prætors, and consider how their provisions were applied, the difference almost disappears. The prætor, like the chancellor, was originally an administrative rather than a judicial officer; but his duties were in the main judicial; it was his chief business to arrange for the termination of private controversies. The edict which each prætor set up at the beginning of his year of office was not a series of commands but a programme. In it he provided certain remedies and indicated under what circumstances each remedy would be given. This programme was carried out, as single cases were presented, by means of formulas sent to the *iudices*. The formula was a command; if the *iudex* found certain allegations of the plaintiff to be true, and if he did not find certain other allegations of the defendant to be true, he was commanded to render a certain decision. The English chancellor decided cases as he saw fit. The Roman prætor caused cases to be decided as he saw fit. A new rule working itself out in chancery was first disclosed in the decision of the special case which suggested it, and any modification of the new rule was subsequently revealed in the same way. Any new rules which the Roman prætor intended to enforce,

any modifications which he intended to make in the rules laid down by his predecessors, were announced in advance, at the beginning of his year of office. Fundamentally these two methods of creating law are identical, and they both resemble law-finding rather than law-making. The rules laid down were suggested in both systems by actual controversies, and they were amended in both systems as new controversies afforded new points of view. In form the Roman process was more considerate of private interests. The complaint of the English common lawyer, that equity was administered according to the length of the chancellor's foot, would have lost much of its force if the length of the foot had been indicated in advance.

The similarities of the two movements are more striking than the formal differences between them. At the outset of his activity neither the Roman prætor nor the English chancellor was held to be capable of making or finding law or of creating new rights. Each, however, could issue orders, and each could enforce these orders *in personam* by fine and imprisonment. Each was therefore able to impose new sanctions and to create new remedies; and eventually, in both systems, it was recognized that where there was a sanction there must be a rule and where there was a remedy there must be a right. Strictly speaking, the rules laid down in the edicts of the prætors and those expressed or implied in English decisions in equity became law by force of custom. It was by the iteration of the same rule in successive prætorian edicts (*edicta tralaticia*) that the Roman official law was built up. It was by the observance of precedents and the development of a settled practice that English equity came to be a regular part of the English law.

There was however, one important historical difference between the two movements. The development of the Roman prætorian law not only made Roman law more equitable, but it also introduced into that law the commercial customs of the Mediterranean—customs which apparently date back in part to the Babylonian Empire. A similar reception of European commercial law took place in England, but here it came later, after the development of equity and chiefly through the action of the common law courts. In both

cases, however, as Goldschmidt has pointed out, commercial law was not brought in as a distinct and separate system, as in the modern continental European states; the English law was commercialized by decisions of the common law courts, largely rendered in the eighteenth century, just as the Roman law had been commercialized by the prætorian edict in the second and first centuries B. C.

In the Roman Imperial period the processes of law making became more obviously similar to the processes by which law has been developed in modern times. Under the Empire, law-finding gradually became altogether governmental. The first step in this direction was taken, as we have seen, when the jurists became representatives and agents of the Emperors. The next step was to establish new courts, civil and criminal, in which Imperial officials heard the pleadings and the evidence and rendered the decisions (*iudicia extraordinaria*). The last step was to transform the surviving courts of the older Republican type—the prætorian courts—into purely governmental courts. This change was accomplished by substituting for independent citizen *iudices* subaltern officers of the court itself, mere referees. This last change brought the Roman courts to substantially the same form as the European continental courts of the present day. To describe the change in English phraseology, not only did the magistrates become judges, but jury trial was abolished.

In proportion as law-finding was governmentalized, it was also centralized. From the judgments of the independent *iudices* appeals had never been permitted. From the decision of the Imperial judges appeals ran to the Emperor, or to such higher judges as he might designate. In the Imperial Council, or rather in that branch of the council which came to be known as the Auditory, the Roman Empire obtained a supreme court of appellate jurisdiction.

In connection with these changes, all the more important offices of a judicial character came to be filled by the patented jurists. During the Republican period and under the first Emperors, the jurists might occasionally act as *iudices* and they frequently became magistrates, but their control over law-finding, although practically complete,

was for the most part indirect. The great Roman jurists of the second and third centuries of the Christian era were judges in a modern sense; and it was by their direct activity, *i. e.*, by their decisions on points of law, and particularly by the decisions rendered in the Imperial Auditory that the law of the Empire was chiefly developed. Their decisions were reported and digested in their own writings. To treat the juristic literature of the early Empire as "scientific law" or "legal theory," which became law only by popular or professional recognition, is to misrepresent its character and its authority. If the eminent European scholars who have written the standard histories of the Roman law were familiar with development of Anglo-American law, they would readily recognize the true character of the law developed in the Roman Empire.

In the early Empire, as in the Republic, direct legislation played only a subordinate part in the development of the law. After the middle of the third century, however, when the production of juristic literature ceased, it is commonly assumed that all legal change was made by direct Imperial legislation. As late as the beginning of the fourth century, however, the law was still developing largely by decisions. The Imperial rescripts which date from the latter part of the third and the early part of the fourth centuries, and which constitute so important a part of Justianian's *Codex*, are case law, *i. e.*, they are decisions reached by the Imperial supreme court, published as Imperial rescripts; and for the most part these rescripts are fully up to the level of the previous century. It was not until the fourth century that the Emperors began to declare that rescripts issued in single cases were not to be regarded as establishing general rules. Then, indeed, legislation became almost the sole factor of legal development. This change, however, was not the result of a progressive evolution, it was a symptom of degeneration. Judicial decisions ceased to be regarded because jurisprudence had sunk to so low an ebb that the decisions were not worth regarding. The older case law, however, stood in undiminished honor and authority. Much of it was saved in Justianian's *Digest*, some of it in his *Codex*. Only in those casuistic portions of Justianian's compilation were there seeds of life; and from

the close of the eleventh to the close of the nineteenth century those seeds have yielded rich and renewed harvests.

The subject assigned me—with which I have been taking certain liberties—is not European legal history nor legal history in general nor comparative jurisprudence; it is Roman legal history; and for this reason I have thus far confined myself to indicating how largely the study of English legal history may be expected to help us to a deeper and truer comprehension of Roman legal history. I trust, in closing, that I may be permitted to take a further liberty with my theme, and to indicate that a careful study of Roman legal history will be of great service to the English or American student who desires to comprehend his own legal history. I lay little stress on the point that we may thus recognize what has been borrowed; I desire chiefly to insist upon the point that we may thus better appreciate the true character of English legal history as an independent development. Furnished with a knowledge of the Roman law and of its development, the English investigator will more accurately gauge by comparison the excellencies and the defects of the English law. He may not find that the Roman law is more scientific—a statement which I take to mean that its broader generalizations are thought to be more correct—but he will certainly find that the Roman law is more artistic. The sense of relation, of proportion, of harmony, which the Greeks possessed and which they utilized in shaping matter into forms of beauty, the Romans possessed also, but the material in which they wrought was the whole social life of man. There was profound self-knowledge in the saying of the Roman jurist that jurisprudence was "the art of life."

The comparative student will find also that while the English law has developed in certain directions further than the Roman, the Roman law in certain other respects had attained sixteen hundred or even two thousand years ago a development which seems to go beyond ours. This is true, for instance, in the whole field of commercial dealings. The great regard paid in all commercial transactions to good faith and the instincts of an honest tradesman, and in particular the abandonment by the Romans, two thousand years ago, of the primitive and dishonest

doctrine of *caveat emptor*—a doctrine which the English law still unaccountably retains—point out lines along which, I believe, our own law is bound to develop.

Best of all, the comparative student will learn to distinguish between that which is peculiar and therefore accidental in both systems and that which is common to both and therefore presumably universal. It has long been the hope of some of the greatest modern jurists, both in English-speaking countries and in Europe, that by strictly inductive study it may be possible to discover a real instead of an imaginary natural law. The corresponding hope of the legal historians, that it will in time be possible to formulate the great laws that govern legal development, is not, I believe, an idle dream ; and I am sure that the minute comparative study of Roman and Anglo-American legal developments will carry us further towards such a goal than any other possible comparison.

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